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No. 95-1623 and No. 95-1624

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MIKE MOORE, *et al.*,

Appellants,

v.

JOHNNY DUPREE, *et al.*,

Appellees.

LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, *et al.*,

Appellants,

v.

JOHNNY DUPREE, *et al.*,

Appellees.

On Appeal from the United States District Court for the Southern District of Mississippi

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MOTION TO AFFIRM

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QUESTIONS PRESENTED

Whether the District Court properly applied Clark vs. Roemer, 500 U.S. 646 (1991), in holding that the Attorney General did not preclear under § 5 of the Voting Rights Act a voting change that the State of Mississippi failed to identify with specificity in its submission of other voting changes.

Whether the District Court properly exercised its remedial powers in a § 5 action by enjoining the enforcement of an unprecleared voting change until the State complies with the Voting Rights Act.

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MOTION TO AFFIRM

Pursuant to Rule 18.6, the Appellees move to affirm the judgment of the District Court because the questions are so insubstantial that further argument is unnecessary. The District Court's decision is based on well-established precedent and presents no conflict or issue of statutory interpretation that requires resolution by the Court.

STATEMENT OF THE FACTS

A. Introduction

Since 1926, Mississippi law required that the boundaries of a city school district be, at a minimum, coterminous with its parent city. Thus, residents of a city were always residents of the city school district. These residents elect the city council, which in turn appoints the members of the school board for the city school district. The State of Mississippi attempted to change this policy in 1986 by repealing Miss. Code Ann. § 37-7-611, which provides that when a city annexes territory the boundaries of the city school district automatically expand to encompass the territory annexed by its parent city.[1]

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[1] In 1977 and 1978, the State of Mississippi attempted to create an exception to § 37-7-611 by amending Miss. Code Ann. § 21-1-59. These amendments provided that extension by annexation of a city's boundaries across a county line would not affect the boundaries of the adjacent county school district unless the county school district consented to allow the annexed area to be included in the city school district. J.S. App.43a-44a.

In 1991, the District Court granted summary judgment in favor of the Appellees on their claim that the 1977 and 1978 amendments to § 21-1-59 are not enforceable because they were never precleared by the Attorney General. Dupree vs. Mabus, 776 F. Supp. 290, 303-04 (S.D. Miss. 1991) (Dupree I), vacated and remanded on other grounds sub. nom, Dupree vs. Moore, 503 U.S. 930 (1992). No cross-appeal of this portion of the District Court's judgment in Dupree I was filed. No issue related to the enforceability of the amendments to § 21-1-59 is before the Court.

As a result of the repeal of § 37-7-611, residents of an area annexed by a city would not necessarily be residents of the city school district; they could remain residents of the county, or suburban, school district. This fundamental alteration of the long standing policy in Mississippi created an anomaly in voting. The newly annexed residents continue to elect directly the board members of their county, or suburban, school district, and at the same time indirectly select the board members of the city school district by participating in city council elections.

The repeal of § 37-7-611, as well as the amendments to § 21-1-59, limited the expansion of the Hattiesburg School District when its parent city expanded by annexation into neighboring Lamar County in 1979, 1981, 1982, 1985 and 1989 and into Forrest County, where the City of Hattiesburg is primarily located, in 1989. Because of these laws, the Hattiesburg School District did not expand to include the suburban property annexed by the City.

B. Procedural History of Dupree

The State of Mississippi enforced the repeal of § 37-7-611 and the amendments to § 21-1-59 despite not gaining preclearance as required by the Voting Rights Act. In February 1990, the Appellees, individually as residents and registered voters of the City of Hattiesburg and in their official capacities as members of the school board of the Hattiesburg School District, filed this action under § 5 of the Voting Rights Act against the State of Mississippi. The Appellees sought declaratory and injunctive relief to halt enforcement of the laws. After the three-judge court convened, the Lamar County and Forrest County school districts and their school boards intervened as Defendants. In both school districts, board members are elected directly

by the residents of the county school district. Miss. Code Ann. §§ 37-5-1, -3.

In its first opinion in this litigation, the District Court held that the repealer of § 37-7-611 had been properly submitted to and precleared by the Attorney General in 1986. Dupree vs. Mabus, 776 F. Supp. 290, 303 (S.D. Miss. 1991) (Dupree I). The Court vacated Dupree I and remanded for reconsideration in light of Clark vs. Roemer, 500 U.S. 646 (1991). 503 U.S. 930 (1992).[2]

On remand, the District Court held that, when measured by the principles outlined in Clark, the repealer of § 37-7-611 had not been precleared. The State did not specifically identify the voting change effected by the repealer in its 1986 submission of other voting changes. Dupree vs. Moore, 831 F. Supp. 1310, 1317 (S.D. Miss. 1993) (Dupree II).

After the District Court issued Dupree II, the Appellants filed motions that tolled the time for appeal. Before the District Court ruled on these motions, the Appellants filed an appeal to this Court. The Court dismissed the appeal for lack of jurisdiction on January 18, 1994. 127 L. Ed 2d 69 (1994).

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[2] Shortly before the District Court decided Dupree I, the Mississippi Supreme Court addressed the preclearance of the repealer of § 37-7-611 in Greenville Public Sch. Dist. vs. Western Line Public Sch. Dist., 575 So. 2d 956 (Miss. 1990), cert. denied, 117 L. Ed. 2d 649 (1991). The state supreme court ruled that even if the repealer of § 37-7-611 was not precleared, another section of the Uniform School Law (§ 52) implicitly repealed § 37-7-611.

The District Court denied the motions on April 13, 1994, and the Appellants again filed an appeal. J.S. App. 79a. The Court vacated Dupree II and remanded for clarification of the remedy. 131 L. Ed 2d 550 (1995); see J.S. App. 81a. On remand, the District Court held that it intended to enjoin both the implicit and explicit repeal of § 37-7-611. Dupree vs. Moore, No. H90-0043(W) (S.D. Miss., Dec. 29, 1995) (Dupree III). J.S. App. 1a. The Appellants filed a notice of appeal after the District Court denied their post-judgment motions. J.S. App. 93a.

C. Submission Histories of the Uniform School Law and the Repealer of § 37-7-611

The focus of this appeal -- the status of the repeal of § 37-7-611 -- requires a review of the submission histories of the Uniform School Law (USL) and the repealer of § 37-7-611. In 1986, the Mississippi Legislature passed the USL, a sweeping act affecting a wide range of topics. This Law consisted of 203 sections and repealed, enacted or amended more than 300 separate statutes. Section 47 of the USL repealed § 37-7-611 and twenty-two other statutes that dealt with "the creation and operation of municipal separate school districts." J.S. App. 171a.

Section 52 of the USL amended Miss. Code Ann. § 37-7-103. Prior to 1986, § 37-7-103 permitted a county board of education to abolish the boundaries of any school district in the county except a city school district. With the consent of the city school district, the county board of education could add to the city school district any part of the county adjoining the city school district or detach territory from the city school district and merge it into the county school system. Section 37-7-103 now provides that any

school district has authority to alter its boundaries by agreement with an adjoining district. J.S. App. 172a-173a.

The State submitted the USL to the Attorney General for preclearance on July 22, 1986. J.S. App. 128a. The submission consisted of a one-page cover letter, a thirteen-page document containing information arranged in accordance with the Department of Justice regulations governing § 5 submissions and a 467-page looseleaf booklet titled "Senate Bill 2117 - Comparison of Current Law and New Law," which contained the typed version of the bill interspersed with photocopied pages of the then-current statute amended by particular sections of the USL. J.S. App. 143a-202a.

The one-paragraph "Introductory Note" to the looseleaf booklet states that it provides "on a section by section basis each section of the current law which has been amended followed by each individual section of" the USL. J.S. App. 143a. Thus, the State did not provide the Attorney General with a comparison of the prior law with the proposed law if the prior law was repealed.[3]

In 1986, § 51.25(a) of the regulations governing § 5 submissions to the Attorney General required that a copy of the enactment embodying the voting change be provided. J.S. App. 90a. In addition, § 51.25(b) stated that if the voting change was not "readily apparent on the face of the

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[3] The Note also indicates that if a section of the Law creates "new law then only those particular sections will be denoted with no comparison of current law." J.S. App. 143a. The Appellants are incorrect when they state that the notebook "compared each section of the [USL] with prior law." J.S. No. 95-1623, p.5.

document provided under" § 51.25(a), the submission must contain "a clear statement of the change explaining the difference between the submitted change and the prior law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the prior and proposed situation with respect to voting." J.S. App. 90a. The regulations did not require the submitting jurisdiction to provide a copy of the prior law being repealed or amended.

The State characterized its submission as follows:

> This submission is cited as the "Mississippi Uniform School Law of 1986" and is submitted to the Attorney General of the United States in its entirety. . . . For the sake of brevity, the submission will only set forth the particular sections which deal primarily with voting rights even though the complete act is submitted for review. [J.S. App. 131a.]

The State specifically identified in the submission only thirteen of the 203 sections of the USL. J.S. App. 131a-137a. Section 47, which repealed § 37-7-611, was neither identified nor referred to anywhere in the thirteen-page submission. The brief text of § 47 does appear, without explanatory comment by the State, in a copy of the USL and in the looseleaf booklet supplied to the Attorney General. J.S. App. 171a. Section 52, which amended § 37-7-103, was one of the thirteen sections specifically identified and discussed in the submission. J.S. App. 133a.

In explaining § 52, the State specifically identified an amendment to § 37-7-103 that permits any school district to alter its boundaries by consent of the adjoining school

district. This voting change was precleared in 1986. The discussion of § 52 consisted of a paraphrase of the then-current statute and the amended version. The discussion made no mention of § 47 or § 37-7-611 and did not refer in any way to the State's long standing policy, reflected in § 37-7-611, of automatically extending a city school district's boundaries after an annexation by its parent city. The State did not say, or even suggest, that § 52 was designed to replace the policy reflected in § 37-7-611. The unidentified, and therefore unprecleared, voting change effected by the amendment to § 37-7-103 was the implicit repeal of the provision in § 37-7-611 that automatically extended a city school district's boundaries to include the territory annexed by its parent city in an adjoining county school district. Thus, the voting change effected by § 52's implicit repeal of § 37-7-611 was not identified in the State's submission.

The Attorney General responded to the State's submission on August 29, 1986. He did "not interpose any objection to the voting changes occasioned by [the USL], as identified in your July 22, 1986, letter." J.S. App. 203a. (emphasis added). The voting change effected by the repeal of § 37-7-611 was not specifically identified in the submission and was not precleared. The State acknowledged that the status of § 37-7-611 remained unclear after the Attorney General's response, J.S. App. 238a, and conceded in the District Court that the State's July 1986 submission contributed to the uncertainty. Memorandum in Support of State Defendants' Motion to Dismiss, p.8.

In formal recognition of the absence of preclearance, the State submitted § 47 to the Attorney General on December 30, 1987. J.S. App. 205a. In its submission of § 47, the State conceded that the entire USL was not precleared by the Attorney General. See, e.g, id. 208a

("The major part of [the USL], as it deals with the Voting Rights Act . . . has already been precleared."); id. 211a ("[M]ost of" the USL has "already been precleared by the "Justice Department.); id. ("[S]ubstantive parts of" the USL were "precleared by the Justice Department."). The State also acknowledged that this voting change was being enforced at the time of the submission. Id. 210a.

On January 27, 1989, the State responded to the Attorney General's request for additional information concerning the repeal of § 37-7-611. The State again acknowledged that the Uniform School Law had not been precleared in its entirety in 1986. J.S. App. 222a. Moreover, the State admitted that § 47 had not been specifically identified in the earlier submission of the USL:

> On July 22, 1986, the State of Mississippi submitted [the USL] for preclearance under Section 5 of the Voting Rights Act. On August 29, 1986, [the USL] was precleared under Section 5 as to the particular sections identified in our July 22, 1986 submission.
>
> On December 30, 1987, the State of Mississippi submitted [the repealer of § 37-7-611] since [it] was not specifically identified in our original submission. [J.S. App. 221a (emphasis added).]

The Attorney General interposed an objection to the repeal of § 37-7-611 on March 31, 1989.[4]

On January 12, 1990, the State sought reconsideration of the Attorney General's limited preclearance of the USL or, alternatively, the objection interposed to the repeal of § 37-7-611. J.S. App. 234a. The State contended for the first time that the entire USL had been submitted and precleared in 1986. J.S. App. 235a-236a. On May 25, 1990, the Attorney General rejected the State's position because it "appear[ed] to seriously misconstrue the structure, purpose, and history of the preclearance requirement." J.S. App. 265a. Section 5 "plainly fixes the responsibility for identifying voting changes on the state, not the . . . Attorney General, yet the state appears to be arguing . . . that the Attorney General should have uncovered voting changes of which the state itself seemingly was unaware at the time the prior submissions were made." J.S. App. 266a.

In Dupree I, the District Court concluded the 1986 repealer of § 37-7-611 had been adequately identified in the State's submission of the USL and, therefore, precleared by the Attorney General when he did not interpose an objection within 60 days. J.S. App. 29a-38a. The Appellees in the

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[4] The Attorney General concluded the repeal of § 37-7-611 would likely "create a class of city voters (for the most part predominantly white) who will not reside in the city school system yet may vote for the city governing body which, under Mississippi law, appoints the city school board." The State did not provide a rationale for the creation "of such a political system which appears not only to have the potential to impact negatively on the influence of minority city school district residents but also to treat black voters differently than white voters." J.S. App. 232a.

current appeal filed an appeal of that portion of the District Court's judgment in Dupree I.

The Court vacated and remanded Dupree I in light of its decision in Clark vs. Roemer, 500 U.S. 646 (1991), which emphasized a state's obligation to identify with specificity each voting change for which it seeks preclearance. On remand, the District Court ruled in Dupree II that

> Mississippi's 1986 submission is precisely that circumstance condemned by Clark vs. Roemer. Should this court permit Mississippi to submit a haystack of documents and obligate the Attorney General to painstakingly search for any voting change needle, as Mississippi has done here, this court would be ignoring Clark's clear pronouncement that a State must "identify with specificity each change that it wishes the Attorney General to consider" in a § 5 submission. [J.S. App. 60a.]

As a result, the District Court held the repealer of § 37-7-611 to be ineffective and unenforceable until Mississippi obtains administrative or judicial preclearance. J.S. App. 60a-61a. Regarding § 52, the District Court held that, "even if § 52 in effect amounted to a repeal of § 37-7-611 by operation of law, that fact was not submitted to the Attorney General in 1986 nor reviewed by him as such." J.S. App. 58a-59a.

The Appellants filed an appeal of Dupree II. The Court remanded for clarification of the scope of the District Court's remedy. The question posed by the Court was

whether the District Court enjoined only § 47 of the USL or whether it also enjoined § 52 of the USL insofar as it implicitly repealed § 37-7-611. J.S. App. 81a. On remand, in Dupree III, the District Court made clear that in addition to enjoining the express repeal of § 37-7-611 by § 47, it also intended to enjoin § 52 insofar as it implicitly repealed § 37-7-611. J.S. App. 4a-5a. The District Court enjoined the explicit and implicit repeal of § 37-7-611 for the same reason. The State failed to identify with specificity the voting change effected by the repeal of § 37-7-611.

ARGUMENT

The issues in this appeal concern the District Court's interpretation of § 5 and the scope of the remedy issued by the court.

A. The District Court's interpretation of § 5 of the Voting Rights Act is consistent with decisions of the Court and the objectives of the Act.

The District Court's decision is a straightforward application of Clark vs. Roemer. The holding that the State failed to identify with specificity the voting change for which it sought preclearance does not depart from the Court's precedent or create a conflict with a decision from another circuit. The decision does not undermine the process for administrative preclearance because the Justice Department's position prevailed in the District Court. The District Court's decision is so obviously correct that it should be summarily affirmed.

The argument advanced by the Appellants and the dissenting judge in Dupree II would significantly reduce the responsibility of jurisdictions covered by the Voting Rights

Act to identify clearly the voting changes submitted to the Attorney General for preclearance. The relaxation of that burden on submitting jurisdictions would "subvert the efficacy of administrative preclearance under § 5." Clark vs. Roemer, 500 U.S. at 655. Ultimately, the purpose envisioned by Congress for administrative preclearance -- providing states with an expeditious method of having nondiscriminatory voting laws implemented without undue delay -- would not be served.

Since Allen vs. State Bd. of Elections, 393 U.S. 544 (1969), the Court has interpreted the Voting Rights Act to require that a state submit its voting changes to the Attorney General in an "unambiguous and recordable manner." Id. at 571; see United States vs. Board of Comm'rs, 435 U.S. 110, 136 (1978) ("the purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him"). The regulations governing § 5 submissions have always contained a similar requirement. City of Rome vs. United States, 446 U.S. 156, 169 n.6 (1980).

In McCain vs. Lybrand, 465 U.S. 236 (1984), the Court provided direction on this issue, and the principles articulated there were reaffirmed in Clark vs. Roemer.

> We made clear [in McCain] that the submission of legislation for administrative preclearance under § 5 defines the scope of the preclearance request. Under normal circumstances, a submission pertains only to identified changes in that legislation. We established also that any ambiguity in the

> scope of a preclearance request must be resolved against the submitting authority.

Clark, 500 U.S. at 656 (citations omitted). In reversing the district court's holding that the Attorney General's preclearance of certain identified voting changes constituted preclearance of other related but unidentified voting changes, the Court in Clark reiterated the importance of specificity in the state's submission: The state "must identify with specificity each change that it wishes the Attorney General to consider." Id. at 658. The Court also reaffirmed the presumption established in McCain that the Attorney General will review only the voting changes specifically described in the state's submission. Id. at 657.

Guided by of Clark, the District Court in Dupree II correctly held that the State did not properly submit the repealer of § 37-7-611 to the Attorney General in 1986 when it submitted other voting changes. The submission of the Uniform School Law in 1986 did not contain an explanation of the process by which city school district boundaries automatically expand to encompass territory in an adjacent school district after an annexation by its parent city. Nor did the 1986 submission indicate that this process was repealed by § 47 of the USL. Moreover, the submission is utterly silent about any voting change effected by the repeal of § 37-7-611.

The Appellants contend the discussion of § 37-7-103 in § 52 of the State's submission put the Attorney General on notice that this statute was designed to replace the automatic extension policy of § 37-7-611 and serve as the sole method of altering school district boundaries. The State, however, did not identify the amendment of § 37-7-103 in this manner in the submission. The discussion of § 37-7-103, as

amended, reveals only that any school district could voluntarily agree with any other school district to a revision of the boundaries of the districts. J.S. App. 133a. The State did not indicate that the amended version of § 37-7-103 implicitly repealed § 37-7-611. Thus, the Appellants' position is contrary to Clark: "A request for preclearance of certain identified changes in election practices which fails to identify other practices as new ones thus cannot be considered an adequate submission of the latter practices." 500 U.S. at 658 (quoting McCain).

The Appellants also point to the statements that the USL was submitted "in its entirety" and that "the complete act is submitted for review." J.S. App. 131a. The use of these phrases, they argue, made the submission unambiguous. These phases do not identify any voting change, much less suggest that the State intended § 37-7-103 to replace § 37-7-611. As the Solicitor General noted in the appeal of Dupree I, it is doubtful the State "intended to submit the Uniform School Law 'in its entirety,' since most of its 203 sections have nothing to do with voting." Br. p.17 n.13. A statement that voluminous legislation is submitted "in its entirety" does not satisfy Clark's requirement that a state clearly identify each voting change in its submission.

The Appellants contend that the bare citation in the looseleaf booklet of § 37-7-611 and twenty-two other statutes dealing with the creation and operation of city school districts suffices for a proper submission of the voting change effected by the repeal of § 37-7-611. In other words, the Appellants suggest that, although the State did not identify or explain the automatic extension policy in § 47 or elsewhere in the submission, the Attorney General should have understood that the State intended to change this policy

by including § 37-7-611 in a list of repealed statutes in § 47. Their argument is plausible only if the Attorney General was duty bound to retrieve, review and study the more than one hundred statutes, including § 37-7-611, listed without elaboration as having been repealed in the 1986 submission.

The Court in Clark vs. Roemer expressly rejected the view of § 5 pressed by the Appellants. A state's obligation to identify with specificity each voting change is not a favor bestowed on the Attorney General. Noting the thousands of voting changes reviewed annually by the Attorney General, Clark requires that, before a state's voting change can be enforced, the state must "identify, submit, and receive approval for" the change. 500 U.S. at 658. Requiring the Attorney General to conduct independent research to determine whether a submission contained unidentified voting changes "would add to the Attorney General's already redoubtable obligations." Id.

Today, virtually all voting changes are submitted to the Attorney General for preclearance because of the cost and time constraints in litigating in the District of Columbia District Court. By allowing for administrative preclearance, however, "Congress in no way intended that the substantive protections of § 5 be sacrificed in the name of expediency." McCain, 465 U.S. at 246. Under either method of preclearance, the covered jurisdiction bears the burden of proving that the change in voting does not have a discriminatory purpose or effect, and in both instances "federal officials are confronted with the same 'difficult substantive issue.'" Id. at 247 (quoting Allen, 393 U.S. at 558). In the light of the reliance on administrative preclearance, Clark emphasized the necessity that the State identify each change so the Attorney General can perform her duties under § 5. 500 U.S. at 658.

The Appellants' position would permit a state to claim that the submission of an act is complete and unambiguous, even without specifically identifying each voting change sought to be reviewed, as long as the State includes the catch-all phrase "the complete act is submitted for review." In response, the Attorney General would likely interpose an objection rather than risk approving a discriminatory voting change not identified in the submission but otherwise a part of the "complete act" submitted for review. This response, in turn, would delay "the implementation of validly enacted, nondiscriminatory state legislation," a primary objective of administrative preclearance. See Morris vs. Gressette, 432 U.S. 491, 503 (1977).[5] Although such a response by the Attorney General would be the most prudent exercise of her responsibilities, it "would only add acrimony to the administration of § 5." Georgia vs. United States, 411 U.S. 526, 540-41 (1973).

In the context of judicial preclearance, a covered jurisdiction could not argue that the District of Columbia District Court approved a voting change that was not identified in the complaint or litigated at trial. To hold a state to a less demanding standard in seeking administrative preclearance would render the declaratory judgment route superfluous. Cf. id. at 538 ("Any less stringent standard [for the burden of proof] might well have rendered the formal declaratory judgment procedure a dead letter by making available to covered States a far smoother path to clearance.").

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[5] The Appellants' reliance on Morris is misplaced. The issue presented in this appeal -- whether a voting change was properly submitted to the Attorney General -- was not present in Morris. The submission in Morris was complete and unambiguous. 432 U.S. at 502, 504 & n.19.

The Appellants also construct an argument on the regulation (§ 51.35) in effect in 1986 that required the Attorney General to request additional information if he considered the State's July 1986 submission to be incomplete. J.S. App. 92a. The Appellants' position is wrong for two reasons. First, the Appellants presume the Attorney General considered the State's submission to present the entire Uniform School Law for approval. To the contrary, it is clear the Attorney General considered only the thirteen specifically identified voting changes to be before him for review. This view of the submission is confirmed by the Attorney General's August 29, 1986 response in which he referred to the "voting changes . . . identified" in the State's submission. J.S. App. 203a.

Second, the Appellants' reliance on the lack of a request for additional information reflects a flawed view of the purpose of the regulation, which allows the 60-day period for action to be suspended by a request for additional information. "The judgment that the Attorney General must make is a difficult and complex one, and no one would argue that it should be made without adequate information." Georgia vs. United States, 411 U.S. at 540. The regulation enables the Attorney General to make an informed decision by requesting additional information relevant to the changes identified in the initial submission. The regulation is not a mechanism for the Attorney General to ferret out voting changes a state neglects to identify. A state knows better than anyone what it wishes precleared and the burden of uncovering voting changes in a submission should not be, as the Appellants suggest, the responsibility of the Attorney General.

B. The remedy issued by the District Court for the State's violation of § 5 is consistent with the Court's precedent and the purposes of the Voting Rights Act.

In Dupree III, the District Court enjoined the enforcement of both the explicit and implicit repeal of § 37-7-611 until the State complies with the preclearance requirements of the Voting Rights Act. J.S. App. 4a-7a. This remedy is entirely consistent with the remedy either affirmed or mandated by the Court in prior § 5 cases, including Clark vs. Roemer, which stated: "If voting changes subject to § 5 have not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes." 500 U.S. at 652-53; see, e.g., Dougherty County Bd. of Educ. vs. White, 439 U.S. 32, 36 (1978); Berry vs. Doles, 438 U.S. 190, 191 (1978) (per curiam); Georgia vs. United States, 411 U.S. at 541; Perkins vs. Matthews, 400 U.S. 379, 397 (1971); Allen vs. State Bd. of Elections, 393 U.S. at 572.[6]

Clark vs. Roemer reaffirmed that the "local district court is in a better position than this Court to fashion relief, because the district court is more familiar with the nuances of the local situation." 500 U.S. at 659. (quotations

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[6] The "massive confusion" and "chaos" purportedly created by the remedy in this case is more imagined than real. See J.S. No. 95-1623 p.25. The Plaintiffs (Appellees here) did not request the District Court to modify school district boundary lines. That issue, as Forrest County and the State acknowledge, is presently before the court that oversees the Hattiesburg School District's desegregation order. See id. p.27. The Appellants are parties to that desegregation case and each has filed pleadings opposing any modification of school district boundaries.

omitted). In granting relief, the district court "should adopt a remedy that in all the circumstances of the case implements the mandate of § 5 in the most equitable and practicable manner and with least offense to its provisions." Id. at 660. The Appellants raised on several occasions in the District Court the same arguments pressed now on appeal. The District Court concluded that "the most equitable and practicable" remedy was to enjoin the explicit and implicit repeal of § 37-7-611 until the State complies with § 5.

The correctness of the District Court's remedy is confirmed by an analysis of the remedy proposed by the Appellants in the District Court. See Joint Motion for Remedy (Sept. 13, 1993), p.2. Their remedy consists of two parts. First, school district boundaries would remain as they were prior to 1990, when Dupree was filed. Second, their remedy would preclude the newly annexed residents of the City of Hattiesburg from voting in county school board elections. This suggested remedy is neither equitable nor practicable. It deprives voters in the county school district of the right to vote for county school board members who have the power, among others, to determine the amount of taxes imposed on residents of the county school district.[7] Although these residents would (i) live inside the boundaries of the county school district, (ii) send their children to the county schools and (iii) pay taxes to support the county schools, they could not, under Appellants' proposed remedy, vote in county school board elections or in county school bond elections. In addition, the Appellants' proposed remedy does not address, much less alleviate, the basis for the objection of the Attorney General to the repeal of § 37-7-

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[7] See Miss. Code Ann. § 37-57-105 (procedure for raising revenue from property taxes imposed on residents of school district).

611. The residents of the county school district would still indirectly select city school board members by participating in city elections. J.S. App. 232a.

In attacking the District Court's remedy, the Appellants emphasize the Mississippi Supreme Court's decision in Greenville Public Sch. Dist. vs. Western Line Public Sch. Dist., 575 So. 2d 956 (Miss. 1990), cert. denied, 117 L. Ed. 2d 649 (1991), which held that, even if the repealer of § 37-7-611 was not precleared, the amendment to § 37-7-103 repealed § 37-7-611 by implication under state rules of statutory construction. The Appellants contend the District Court should have deferred to the state supreme court's holding that because the amendment to § 37-7-103 was precleared, "§ 37-7-611 can no longer be given any effect, regardless of its preclearance status." No. 95-1623 J.S. p.21; see No. 95-1624 J.S. pp.7-12.

The District Court correctly rejected this "preclearance by implication" argument, holding that, "even if Section 52 in effect amounted to a repeal of § 37-7-611 by operation of state law, that fact was not submitted to the Attorney General in 1986 nor reviewed by him as such." J.S. App. 59a n.10; see id. 4a-5a.[8] If the State of Mississippi desires to repeal § 37-7-611, either explicitly or implicitly, and as a result, effect a change in its voting laws, the preclearance requirements of § 5 must be satisfied,

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[8] In addition, Dupree III cited Nickles vs. Western Line Sch. Dist., No. 4:90-cv-45BO (N.D. Miss., Oct. 30, 1995), a § 5 action between the same parties to the Greenville state court action. Nickles held that the state court action did not operate to preclude the federal court action because of the intervening decision in Clark vs. Roemer. Mot. App. 1a.

regardless whether the repeal arises from legislative action or by judicial decree. See Hathorn vs. Lovorn, 457 U.S. 255, 269 n.23 (1982); McDaniel vs. Sanchez, 452 U.S. 130, 153 (1981). The State's discussion of the amendment to § 37-7-103 did not identify any attendant change in the State's policy regarding the effect on school district boundaries after an annexation. Therefore, the Attorney General did not preclear the implicit repeal of § 37-7-611 by the amendment to § 37-7-103.

The Appellants' suggestion (No. 1623 J.S. App. p.21; No. 95-1624, p.12) that the District Court enjoined §§ 47 and 52 in their entirety ignores completely the basis for that court's opinions. In Dupree II, the District Court limited its opinion to the voting change effected by the repeal of § 37-7-611. "The repealer of Miss. Code Ann. § 37-7-611 is hereby found to be ineffective and unenforceable" until the State obtains judicial or administrative preclearance. J.S. App. 60a. Dupree III reaffirmed this holding. "Accordingly, we found the Section 47 repealer of § 37-7-611 to be ineffective and unenforceable." J.S. App. 3a.

Dupree II also addressed the State's failure to submit properly § 52's implicit repeal of § 37-7-611.

> Although the State's submission letter did discuss Section 52, in that portion of the submission letter the State did not discuss the repealed matter of automatic expansion. In discussing Section 52, the State merely explained the consent factor relative to alterations of school district boundaries. So, even if Section 52 in effect amounted to a repeal of § 37-7-611 by operation of state law, that fact was not submitted to the

> Attorney General in 1986 nor reviewed by him as such. [J.S. App. 58a-59a.]

In ruling that § 52's implicit repeal of § 37-7-611 should also be enjoined, the District Court in Dupree III accurately observed that "when Section 52 was submitted for preclearance by the Attorney General, the State of Mississippi did not discuss the repealed matter of automatic expansion." J.S. App. 5a. The State specifically identified only the "consent factor relative to alterations of school district boundaries." Id. As a result, "even if Section 52 repealed § 37-7-611, that fact was not submitted to the Attorney General for preclearance. Thus, we are of the opinion that Section 52 was not submitted with the specificity required by Clark vs. Roemer." J.S. App. 5a.

The Appellants' position is also contrary to Judge Barksdale's special concurrence in Dupree III. He "agree[d] that enjoining § 52 ..., insofar as it implicitly repealed § 37-7-611, is required if § 47 is to be enjoined." J.S. App. 8a. The references in Dupree III to "§ 47" and to "§ 52" do not encompass every voting change effected by them but only the repeal of § 37-7-611, the voting change the parties have been litigating for the last six years. The District Court did not address the other statutes repealed by § 47 for the simple reason that they were not challenged by the Appellees. To argue otherwise, as the Appellants now do, is disingenuous.

The Appellants claim that the preclearance of § 52 insofar as it implicitly repealed § 37-7-611 has only recently been raised and only then because "it became clear that § 52 . . . accomplished the same purpose as the § 47 repeal of § 37-7-611." No. 95-1623 J.S. p.22. This statement is incorrect. The District Court initially raised this issue in September 1990 during oral argument on the parties' motions

for summary judgment. "Upon the conclusion of oral argument, the Court specifically requested the parties to submit briefs addressing the effect of § 52 of the [USL] upon the issues of this action." Supplemental Br. of Forrest Co. Sch. Dist. (Oct. 9, 1990), pp. 3-4. The Appellees and the United States as amicus curiae have consistently maintained that the voting change effected by the repeal of § 37-7-611 could not be precleared by implication and that the implicit repeal of that statute by § 52 was not specifically identified in the State's 1986 submission. Plainitffs' Post-Argument Supplemental Br. (Oct. 10, 1990), pp.1-3; Plaintiffs' Supplemental Br. (Jan. 22, 1991), pp.3-4; Memorandum of United States as Amicus Curiae (Mar. 7, 1991), p.35; United States Amicus Curiae Br. (May 21, 1992), p.9 & n.6; Plaintiffs' Rebuttal Br. on Remand (July 2, 1992), p.3.

In summary, the District Court correctly applied Clark vs. Roemer and enjoined the State from enforcing both the explicit and implicit repeal of § 37-7-611 until the State receives either administrative or judicial preclearance. The District Court's remedy is appropriate because the State did not specifically identify this voting change in the 1986 submission of the USL. The District Court's decision is correct and further argument is unnecessary.[9]

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[9] The Appellants raise several issues concerning standing and the proper scope and application of § 5. No. 95-1624 J.S. pp.12-14, 19-26. Dupree I decided these issues against the Appellants and no appeal was taken. Moreover, the District Court's resolution of these issues does not present a substantial question.

CONCLUSION

For these reasons, the District Court's decision should be summarily affirmed.

RESPECTFULLY SUBMITTED,

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May 8, 1996

APPENDIX

APPENDIX A

FILED
OCT 30 1995
NORMAN L. GILLESPIE, CLERK
BY _____
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

JANICE M. NICKLES, ET AL.,
Plaintiffs

V. **NO. 4:90CV45-B-0**

WESTERN LINE SCHOOL DISTRICT, ET AL.,
Defendants

MEMORANDUM OPINION

This cause comes before the court on the issue of whether a previous state supreme court decision, Greenville Public School Dist. v. Western Line Consol. School Dist., 575 So. 2d 956 (Miss. 1990), cert. denied, 503 U.S. 950, 117 L. Ed. 2d 649 (1992) precludes this cause. During the pendency of the state court action, the defendants[1] filed a

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[1]Since the Greenville Public School District and members of the Board of Trustees of the Greenville Public School District, in their official capacities, were realigned as plaintiffs, Western Line School District and its trustees, in

(continued...)

motion to dismiss asserting, inter alia, that the court should abstain from assuming jurisdiction of identical issues and parties in the instant cause. On December 14, 1990 prior to a ruling of the motion to dismiss, on agreement of counsel, the court entered a stay order pending the disposition of an action involving the same issue of law in the United States District Court for the Southern District of Mississippi. That district court rendered a decision on April 1, 1991, Dupree v. Mabus, 776 F. Supp. 290 (S.D. Miss. 1391) [Dupree I] and on August 27, 1993 on remand, Dupree v. Moore, 831 F. Supp. 1310 (S.D. Miss. 1993) [Dupree II]. On February 24, 1994, the plaintiffs filed a joint motion to lift stay asserting that disposition of a unique issue would expedite resolution of this cause. On May 17, 1994 the court lifted the stay for the purpose of addressing the issues of res judicata and the plaintiff Nickles' standing.[2]

The defendants contend that the state court decision involving the same issues and parties precludes this cause on the ground of res judicata. Nilsen v. City of Moss Point, 701 F.2d 556, 559 (5th Cir. 1983). This cause was brought pursuant to 42 U.S.C. § 1973c, section 5 of the Voting Rights Act of 1965, as amended, seeking to enjoin the enforcement of the allegedly unprecleared § 47 of the 1986 Uniform School Law [also referred to as The Education

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[1](...continued)
their official capacities, are the only defendants. The individual plaintiffs, Janice M. Nickles, individually, and Janice M. Nickles as mother and next friend of her minor children, Jennifer R. Nickles and Kathryn R. Nickles, were dismissed by the parties' stipulation pursuant to Rule 41(a)(1)(ii).

[2]The above-referenced stipulation of dismissal of the Nickles rendered the standing issue moot.

Reform Act of 1986], repealing Miss. Code Ann. §37-7-611. "When a city annexed territory, § 37-7-611 provided that the municipal school district automatically expanded to become coextensive with the city limits." Dupree II, 831 F. Supp. at 1313. Section 52 of the Uniform School Law amended Miss. Code Ann. § 37-7-103 "to provide that, when a city annexed neighboring territory, the municipal school district would expand into any already existing school district only with the consent of the school board governing the annexed territory." Id. at 1313-14. It is undisputed that section 52 was precleared. Dupree I, 776 F. Supp. at 293.

In a declaratory judgment action alleging that certain territory annexed to the city of Greenville automatically became part of the Greenville Public School District, the Mississippi Supreme Court held that the Greenville Public School District "was not entitled to the declaratory judgment, and was properly enjoined from disturbing the status quo of the respective school districts." Greenville Public School Dist. v. Western Line Consol. School Dist., 575 So. 2d at 957-58. The court collaterally held that the repeal of § 37-7-611 was precleared, along with the remaining sections of the Uniform School Law. Id. at 965, 966. The court reasoned that the entire statutory scheme of the Uniform School Law, including section 47, was submitted to the United States Attorney General and was precleared by the absence of any objection by the Attorney General to the original 1986 submission.[3] Id. at 965.

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[3]In 1987 the State of Mississippi resubmitted section 47, the repealer of § 37-7-611, to the United States Attorney General for affirmative preclearance. After reviewing the resubmission and extensive additional information, the United States Attorney General objected to the implementation of section 47 insofar as it repealed § 37-7-

(continued...)

The plaintiffs challenge the state court's jurisdiction to decide the preclearance issue. See Hathorn v. Lovorn, 457 U.S. 255, 268-69, 72 L. Ed. 2d 824, 836-37 (1982) (even if federal courts have exclusive jurisdiction over "action[s] under" section 5, "at least when the issue arises collaterally, state courts may decide whether a proposed change in election procedure requires preclearance under § 5"). The plaintiffs contend that the Mississippi Supreme Court went beyond the collateral issue of the applicability of section 5 in deciding an issue reserved for a three-judge panel, i.e., whether the state has complied with section 5. See McCain v. Lybrand, 465 U.S. 236, 250 n. 17, 79 L. Ed. 2d 271, 282 n. 17 (1984) ("The only questions in an action alleging a violation of the § 5 preclearance requirement are (1) whether a change is covered by § 5, (2) if the change is covered, whether § 5's approval requirements have been satisfied, and (3) if the requirements have not been satisfied, what relief is appropriate").

Assuming arguendo that the Mississippi Supreme Court had collateral or concurrent jurisdiction to adjudicate that section 47 has been precleared, the court must consider what, if any, changes have occurred since the state court's ruling. In an action challenging the constitutionality of a reapportionment plan, the Fifth Circuit stated:

> It has long been established that res judicata is no defense where, between the first and second suits, there has been an intervening change in the law or modification of significant facts creating new legal conditions.

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[3](...continued)
611. The Mississippi Attorney General's request for reconsideration of the objection was denied.

Jackson v. DeSoto Parish School Bd., 585 F.2d 726, 729 (5th Cir. 1978). The United States Supreme Court long ago stated the general rule that

> res judicata is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation.

State Farm Mut. Auto Ins. Co. v. Duel, 324 U.S. 154, 162, 89 L. Ed. 812 (1945), cited in Moch v. East Baton Rouge Parish School Bd., 548 F. 2d 594, 597 (5th Cir.), cert. denied, 434 U.S. 859, 54 L. Ed. 2d 132 (1977). In another voting rights action, the Fifth Circuit reasoned:

> Faced with changing law, courts hearing questions of constitutional right cannot be limited by res judicata. If they were, the Constitution would be applied differently in different locations. But '[the Constitution is not geared to patchwork geography. It tolerates no independent enclaves.'

Parnell v. Rapides Parish School Bd., 563 F.2d 180, 185 (5th Cir. 1977) (citation omitted), cert. denied, 438 U.S. 915, 57 L. Ed. 2d 1160 (1978).

Like the Mississippi Supreme Court, the court in Dupree I held that the Uniform School Law of 1986 was precleared in its entirety, including the repeal of § 37-7-611, and that the United States Attorney General's subsequent objection upon resubmission of §47 "was of no effect." 776 F. Supp at 303 (citing Morris v. Gressette, 432 U.S. 491, 53 L. Ed. 2d 506 (1977)). The court stated:

> Morris stands for the proposition that the USAG's failure to object to a complete submission is final, and any subsequent attempts to object are invalid.

776 F. Supp. at 301. The initial submission included the Act in its entirety and the cover letter stated in part:

> For the sake of brevity, the submission will only set forth the particular sections which deal primarily with voting rights even though the complete act is submitted for review.

The cover letter affirmatively identified and discussed only 13 of 205 sections of the Act, including section 52 amending § 37-7-103. Section 47 repealing §37-7-611 was not one of the highlighted sections in the cover letter.

Three months following the state supreme court's denial of petition for rehearing and two months following the Dupree I decision, the United States Supreme Court held that a State "must identify with specificity each change that it wishes the Attorney General to consider" for the purpose of administrative preclearance under section 5. Clark v. Roemer, 500 U.S 646, 114 L. Ed. 2d 691, 704 (1991). The pertinent issue in Clark v. Roemer was "whether the State's failure to preclear certain earlier voting changes under § 5 was cured by the Attorney General's preclearance of later, or related, voting changes." 114 L. Ed. 2d at 700. The Court held that the three-judge district court erroneously found that "the Attorney General 'expressly approved' the prior uncleared changes." Id. at 705. The Court reasoned:

> None of the submissions informed the Attorney General that prior voting changes were uncleared and were being transmitted alone with the new changes.

Id. On March 23, 1992 the United States vacated and remanded Dupree I "for further consideration in light of Clark v. Roemer." 503 U.S. 930, 117 L. Ed. 2d 609 (1992). On remand, the three-judge district court in Dupree II concluded that "Mississippi's 1986 submission is precisely that circumstance condemned by Clark v. Roemer." 831 F. Supp. at 1317. The court held:

> Upon measuring the facts sub judice by the bedrock principles enunciated by Clark,...the Attorney General's letter of August 29, 1986, wherein he stated that he did 'not interpose any objection to the voting changes occasioned by [the 1986 Uniform School Law] as identified in your [the State of Mississippi's] July 22, 1986, letter,' precleared only the specifically identified changes noted in the 13 provisions.

Id. It is clear to the court that Clark v. Roemer is an intervening decision that constitutes an exception to the doctrine of res judicata, as demonstrated in the Supreme Court's remand of Dupree I. See Dupree II, 831 F. Supp. at 1316 ("The juridical polestar which illuminates the key points of law here and leads us decisively to a solution is the case of Clark v. Roemer [citation omitted], the decision upon which the remand of this case from the United States Supreme Court is based"). Accordingly, the previous state court decision does not preclude the instant action.

As the Dupree I court noted, "a state supreme court's interpretation of a state statute is binding on a federal court." 776 F. Supp. at 298. The Mississippi Supreme Court construed §37-7-103, as amended, as repealing by implication § 37-7-611. 575 So. 2d at 963. In Dupree II, on appeal the Supreme Court invited the Solicitor General to file a brief addressing the following issue:

> In light of the Mississippi Supreme Court's holding in Greenville Public School District v. Western Line Consolidated School District, 575 So 2d 956 (Miss 1990), that Miss Code Ann § 37-7-103 (1972 & Supp 1990) supersedes Miss Code Ann § 37-7-611 (1972) and repeals it by implication, what remedy, if any, can a federal court offer for failure to preclear § 47 of the Education Reform Act, 1986 Miss Gen Laws, ch 492, which also purported to repeal 37-7-611?

130 L. Ed.2d 308 (October 17, 1994). On April 17, 1995 the Court vacated and remanded Dupree II

> to clarify whether it has enjoined only Section 47 of the Uniform School Law, 1985 Miss Gen Laws, ch 492, or whether it has also enjoined the effect of Section 52 of the Act (codified as Miss Code Ann Section 37-7-103 (1990)), insofar as Section 52 implicitly repealed Miss Code Ann Section 37-7-61L (1972).

131 L. Ed. 2d 550 (1995). Since the Dupree litigation is in an advanced stage and the three-judge court on remand has been instructed to address the effect of the binding state court ruling on the ultimate remedy to be granted, the court finds that it would be judicially inefficient to proceed with this cause. Therefore, the court will issue a stay order pending final disposition of the Dupree litigation.[4]

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[4]Final adjudication in Dupree of the enforceability of §§ 37-7-611 and 37-7-103, as amended, in the context of section 5 of the Voting Right Act will apply to all counties in Mississippi.

An order will issue accordingly.

THIS, the 27th day of October, 1995.

/s/NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE